SUPERIOR COURT OF WASHINGTON FOR WHITMAN COUNTY

DAVID J. BROWN, Petitioner, v. WASHINGTON STATE UNIVERSITY, Respondent.	No. _____ PETITION FOR REVIEW OF ADMINISTRATIVE DECISION

Petitioner David Brown, by and through his attorney Roger Sandberg, petitions the Court pursuant to RCW 34.05.514 et. seq. for review of the administrative decision of the Conduct Board of Washington State University resulting in the sanction of suspension and trespass. The Conduct Board found that Mr. Brown had committed two violations of the WSU Student Conduct Code, Disruption under WAC 504-25-203, and Failure to Comply with University Officials under WAC 504-26-207. The Office of Student Conduct failed to follow its prescribed procedure in the prosecution of these alleged violations; the order of the Conduct Board is unconstitutional; the Board's decision is not supported by substantial evidence; and the Board's order is arbitrary or capricious.

1. **Petitioner:** David Jesse Brown, 345 NW Parr Drive, Pullman, Washington 99163.

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2. **Petitioner's Attorney**: Roger Sandberg, Esser & Sandberg, PLLC, 520 East Main Street, Pullman, Washington 99163.

3. **Administrative Agency Whose Action Is At Issue**: The agency whose action is at issue is the Washington State University Office of Student Conduct, 190 Lighty Student Services Building, P.O. Box 641062, Pullman, Washington 99164-1062.

4. **Agency Action**: Petitioner appeals the April 12, 2010 decision of the Washington State University Conduct Board, and the May 31, 2010 decision of the Washington State University Appeal Committee affirming the decision of the Conduct Board.

5. **Parties to Administrative Adjudicative Proceeding**: Representing Washington State University at the administrative hearing was Chris Wuthrich. The Conduct Board was chaired by Professor Lisa McIntyre.

6. **Facts Demonstrating that Petitioner is Entitled to Judicial Review**:

Standing: Petitioner David Brown has standing under RCW 34.05.530 as he has been aggrieved or adversely affected by the decision of the University. The University's decision suspends Mr. Brown from the University until at least January 2011. He has also been trespassed from the WSU campus.

Exhaustion of Administrative Remedies: Mr. Brown has exhausted all administrative remedies, including filing an appeal with the University Appeal Committee, which appeal was resolved in the University's favor.

Timely Appeal: Mr. Brown's appeal is timely, having been filed and served within 30 days of service of the University's final order, which service occurred on June 4, 2010.

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Venue: Pursuant to RCW 34.05.514, Mr. Brown files this appeal in the Superior Court of Whitman County.

7. **Petitioner's Reasons for Believing that Relief Should Be Granted**:

Pursuant to RCW 34.05.570(3), the following reasons exist which necessitate reversal of the University's order:

> (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;
> ...
> (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
> ...
> (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;
> ...
> (i) The order is arbitrary or capricious.

A. The University failed to follow a prescribed procedure, and its order was arbitrary and capricious. RCW 34.05.570(3)(c) allows the court to grant relief if, "The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure." The University has failed in at least two respects: (1) The Conduct Board incredibly refused to hear an actual recording of the statement made by Mr. Brown in the MIS 580 class when he offered to play it for the Board at the Student Conduct Hearing, choosing instead to base their decision on inaccurate paraphrases of the statement from other students who admittedly did not like Mr. Brown, and; (2) The Office of Student Conduct failed to clearly state the factual basis of the charges against Mr. Brown.

> i. The Conduct Board wholly failed to perform its duty when it refused to hear the most important evidence in the case: a recording of the allegedly disruptive and insubordinate statement made by Mr. Brown.

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By letters dated April 2, 2010 and April 7, 2010, Mr. Brown was informed that he was charged with violating three provisions of the student conduct code: WAC 504-26-204 Abuse of self or others; WAC 504-26-203 Disruption, and; WAC 504-26-207 Failure to comply with university officials or law enforcement officers. The April 7 letter included the following statement of facts which allegedly supported the violations:

> On or about April 1, 2010 during an in-class discussion in MIS 580 you responded to a question posed from the faculty member to the entire class paraphrased by a witness as follows:
>
> *You just have to realize that a lot of times you can't do something because you are just dumb. You need to look in the mirror and say that the reason you can't do it isn't anything other than you are really dumb. It's like if you kill someone. You can't say, I killed them for some other reason. You have to look in the mirror and say I killed them because I am dumb.*
>
> Students in the class report they were alarmed by your behavior and afraid you may harm them. During your response the faculty member attempted interrupt [sic] your comments but you continued to talk over her. The disruption you caused resulted in the cancellation of your accounting class on April 1.
>
> The disruption you caused in MIS 580 is a continuance of disruptive behaviors you were warned to stop in a letter from David Sprott dated March 10, 2010. Also, on March 25, 2010, you previously were warned by me about disruptive/threatening behavior. In addition, there is a pending student conduct complaint against you based on your harassment of a female student. (Emphasis in original.)

Clearly, the main focus of the proceedings against Mr. Brown was his statement made in the MIS 580 class, which is a class in WSU's Masters in Business Administration program, in which Mr. Brown was enrolled. At the Conduct Board hearing, Mr. Brown strongly disputed the paraphrased versions of his statement as inaccurate and taken out of context. The paraphrase was not offered by a disinterested party, it was offered by a student who admittedly did not like Mr. Brown. Mr. Brown's actual statement was relevant to the topic

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that was being discussed in class that day. Mr. Brown records the lectures in class on his laptop computer, and had an audio recording of the actual statement that was made, and the discussions that led up to the statement and the discussions that followed. He offered to play the recording of the statement to the Conduct Board, so that they could judge the statement on its own merit. Incredibly, the Conduct Board refused to hear the recording – the most important evidence in the case – and gave no reason for its refusal.

The Board's refusal to hear the most pertinent evidence in the case is arbitrary and capricious. Worse, it is evidence that the Board members in this case were shamelessly impartial. Their decision casts doubt on the entire validity of the WSU Student Conduct process.

WSU Student Conduct Board proceedings are governed by WAC 504-26-403. Subsection (4)(a) of that rule contains the following provisions:

> (vii) Pertinent records, exhibits, and written statements (including student impact statements) may be accepted as information for consideration by a university conduct board at the discretion of the chair.
> ...
> (xi) Formal rules of process, procedure, and/or technical rules of evidence, such as are applied in criminal or civil court, are not used in conduct proceedings. Relevant evidence, including hearsay, is admissible if it is the type of evidence that reasonable members of the university community would rely upon in the conduct of their affairs. The chair of the student conduct board shall have the discretion to determine admissibility of evidence.

It is true that these provisions vest in the chair of the Student Conduct Board the discretion to determine the admissibility of evidence. But where an actual recording of a statement alleged to single-handedly constitute two violations of the Student Conduct Code is offered to be played for the fact-finder, it is an abuse of discretion to not allow that recording into

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evidence. By failing to admit relevant evidence, the University has failed to follow a prescribed procedure, and that decision is also arbitrary and capricious.

ii. The University improperly considered evidence of acts for which Mr. Brown had already been punished.

The Office of Student Conduct's April 7 letter setting forth the facts against Mr. Brown states, "The disruption you caused in MIS 580 is a continuance of disruptive behaviors you were warned to stop in a letter from David Sprott dated March 10, 2010." Those prior 'disruptive behaviors' had already been punished. That was the purpose of David Sprott's March 10 letter. Mr. Sprott was informed of the prior incidents, and made a decision that those incidents did not amount to a student conduct violation, and the sanction that he chose to impose was a 'warning'. Evidence relating to those prior incidents should not have been allowed to be re-introduced before the student conduct board when they had already been dealt with. WAC 504-26-403(4)(b) states:

> If the accused student is found responsible for any of the charges brought against the accused, the board may, **at that time**, consider the student's past contacts with the office of student conduct in determining an appropriate sanction. (Emphasis added)

Because that provision specifies that prior contacts may only be considered when determining the appropriate sanction, the implication is that **prior contacts with the office of student conduct may not be considered in determining whether a student is responsible for the charges he is currently facing**. If the university had already determined that the prior incidents did not constitute a violation of the student conduct code, those same incidents should not have been piled on to the current alleged violation in an attempt to improperly sway the Conduct Board's opinion against Mr. Brown. The current alleged violation should have been judged on its own merit.

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Nonetheless, the Conduct Board did consider extensive evidence relating to those prior incidents. They heard testimony from David Sprott regarding the prior incidents, and admitted documents from Mr. Brown's student conduct file relating to incidents for which Mr. Brown had already been punished. The first two-and-a-half pages of the Conduct Board's five-page decision recite incidents from earlier in the school year that had already been dealt with by David Sprott.

The University's admission of evidence related to these prior incidents is another example of the University failing to follow its prescribed procedure.

iii. The University failed to sufficiently inform Mr. Brown of the factual basis of the charges against him.

WAC 504-26-403 states:

> (2) The written notice shall be completed by the conduct officer and shall include:
>
> (a) The specific complaint, including the university policy or regulation allegedly violated;
>
> (b) **The approximate time and place of the alleged act that forms the factual basis for the charge of violation**.... (Emphasis added)

The April 7 letter informing Mr. Brown of the charges against him failed to sufficiently delineate the facts supporting the individual charges. This became especially problematic when the Conduct Board found Mr. Brown 'not responsible' for the 'Abuse of self or others' charge, because it was impossible for Mr. Brown to discern which facts the Board found him to have committed, and which facts the Board found did not occur. Therefore, it was difficult, if not impossible, for Mr. Brown to accurately respond to the University's findings in his appeal to the University Appeal Committee.

What acts were deemed to constitute a violation of the University Conduct Code? For example, is the 'failure to comply with university officials' charge based on "a

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continuance of disruptive behaviors you were warned to stop"? Or is it that Mr. Brown allegedly "continued to talk over" the faculty member who attempted to interrupt him in the MIS 580 class? Likewise, on which facts is the 'abuse of self or others' charge based? Is it based on the incident in the MIS 580 class? Or is it based on Mr. Brown's alleged "harassment of a female student"? Or is it based on the "continuance of disruptive behaviors you were warned to stop"? Finally, is the 'disruption' charge based on the statement in the MIS 580 class? Or is it based on a "continuance of disruptive behaviors you were warned to stop"?

The Conduct Board's decision failed to specify which facts supported the charges for which it found Mr. Brown 'responsible'. For example, Mr. Brown was found 'not responsible' for violating WAC 504-26-204, Abuse of self or others, which is defined as, "Physical abuse, threats, intimidation, and/or other conduct which threatens or endangers the health or safety of any person, including one's self." Does the fact that Mr. Brown was found 'not responsible' for this charge mean that the conduct board found that he did not make a threatening statement in the MIS 580 class? **If the conduct board concluded that the statement was not threatening, then why was Mr. Brown trespassed from campus?** Or was the 'Abuse of self or others' charge related to the "disruptive/threatening behavior" that Mr. Brown was supposedly previously warned about by Chris Wuthrich on March 25? If so, is a finding of 'not responsible' a conclusion that that "disruptive/threatening behavior" did not occur?

On the other side of the coin, the Conduct Board found Mr. Brown 'responsible' for 'disruption' and 'responsible' for 'failure to comply with university officials'. Based on what facts? What specific facts, *not to include facts for which Mr. Brown was already*

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sanctioned by David Sprott on March 10, support the university's decision that he was disruptive? Those facts must be articulated, so that Whitman County Superior Court can decide whether those facts support the charge. What specific facts support the university's decision that Mr. Brown have failed to comply with university officials? Again, those facts must be specified so that a reviewing court can decide whether the facts support the charge.

When a governmental agency, such as WSU, takes steps to restrict the freedoms and rights that Mr. Brown enjoys, such as the right to free speech and the right to travel freely, the government's action must be grounded in **specific** facts, not a "grab bag" of facts that the agency finds distasteful. **If WSU cannot articulate which facts support which charges, then WSU has not met its burden of finding by a preponderance of the evidence that Mr. Brown committed violations of the Student Conduct Code.**

B. Substantial evidence does not support the University's sanction. Prior incidents may not be considered by the Conduct Board in deciding whether a student is responsible for a violation of the Student Conduct Code. Without the prior incidents, the only evidence in support of sanctions against Mr. Brown is an inaccurate paraphrase of Mr. Brown's statement in the MIS 580 class – a paraphrase offered by a student who admittedly did not like Mr. Brown. That does not constitute substantial evidence which would justify the sanctions against Mr. Brown.

8. **Request for Relief**: Mr. Brown requests the following relief:

1. That this court reverse the decision of the University suspending him from the University until January 2011, and trespassing him from the WSU campus

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2. Attorney fees pursuant to the Washington Equal Access to Justice Act, RCW 4.84.350.

3. If this court should remand this matter for a new trial at the University level, that the members of the Student Conduct Board in Mr. Brown's original trial not be allowed to participate.

3. Such other relief as the Court deems proper.

Appellant reserves the right to make a more complete statement of the issues stated herein.

DATED: This 14 day of July, 2010.

By _____
Roger Sandberg, WSBA No. 39020

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